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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 1038 79

JOHN G. GETZ, JR.,

Respondent,

7411 *vs.*

CITY OF HARVEY,
a municipal corporation, et al., etc.

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF

JOHN J. DOWDLE,
Attorney for Petitioner.

A. O. HOFFMAN,
WILLARD C. WALTERS,
Of Counsel.

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No. .....

JOHN G. GETZ, JR.,

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7411 *vs.*

CITY OF HARVEY,
a municipal corporation, et al., etc.

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, City of Harvey, a municipal corporation, organized and existing under and by virtue of the laws of the State of Illinois, Frank W. Bruggemann, its Mayor, Charles H. Applegate, Jr., Arthur E. Turngren, Norman C. Gallett, George P. Fisher, its Commissioners, Frank C. Norton, its Clerk, W. L. Voss, its Treasurer, and R. Wm. Mallstrom, Superintendent of the Water Department of the City of Harvey, respectfully pray for the issuance of a writ of certiorari herein directed to the

United States Circuit Court of Appeals for the Seventh Circuit to review a certain final decision and opinion of said court rendered and filed in the above entitled cause on February 28, 1941. (R. 928)

A petition for rehearing was filed by petitioners on March 14, 1941, within fifteen days after entry of judgment in said cause, as prescribed by Rule 22 of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit. (R. 947)

An order denying the petition for rehearing, but modifying the opinion theretofore filed in said cause was entered in the United States Circuit Court of Appeals for the Seventh Circuit on April 7, 1941. (R. 965)

This petition for the issuance of a writ of certiorari, together with supporting brief and a certified transcript of record are filed in this court within three (3) months after the entry of said order in the United States Circuit Court of Appeals for the Seventh Circuit denying said petition for rehearing.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This is a suit in equity brought in the United States District Court for the Northern District of Illinois, Eastern Division, by John G. Getz, Jr., respondent herein, a citizen of the State of Michigan, against the City of Harvey, a municipal corporation of the State of Illinois, its Mayor, Commissioners, City Clerk, City Treasurer and Superintendent of the Water Department, petitioners herein.

In this suit respondent alleges that he is the owner and holder of $243,000.00 par value water certificates of in-

debtedness of said City of Harvey, payable solely from revenues derived from the operation of a water works system of said City designated as Water Works System No. 2. Respondent claims that said certificates of indebtedness are legal and binding obligations of the City of Harvey; that petitioners have misapplied or otherwise illegally diverted some portion of the revenues derived from the sale of water by the City of Harvey and asks; for an accounting of all moneys received or collected from the sale of water by the petitioner, City of Harvey, its officials and agents; that the proportionate share which is allocable to Water Works System No. 2 be determined from the moneys so collected; for judgment against the petitioners herein for such sums as are found to have been illegally diverted from a special water fund designated as Special Water Fund No. 2; for an order restraining the petitioners from diverting or in any other manner misapplying funds belonging to Special Water Fund No. 2 and for the appointment of a Receiver of all the property and assets of said Water Works System No. 2. (R. 14, 15)

Petitioners in and by their answer urge two grounds of defense to the charges made in the complaint. Firstly, that the water certificates of indebtedness allegedly owned and held by the respondent, John G. Getz, Jr., are invalid and void. Secondly, should the court find that said water certificates of indebtedness are valid, that they are non-negotiable instruments under the law of the State of Illinois, and therefore are subject to any existing rights and defenses, which defendant, City of Harvey has or could interpose against A. C. Allyn & Company, who acquired said certificates pursuant to the terms of a written agreement with the City of Harvey, whereby said A. C. Allyn & Company agreed to refund all of the outstanding certificates of the City of Harvey. (R. 22)

The cause was referred to a Master in Chancery of the District Court, who, after extended hearings, rendered his revised and substituted report, in which he ruled that the petitioner, City of Harvey, was estopped to deny the validity of the water fund certificates of indebtedness of the City of Harvey, payable solely from the Special Water Works Fund No. 2, but allowed the alternative relief prayed for by the petitioner, City of Harvey and ordered the respondent, John G. Getz, to deliver up to the Clerk of the District Court the said $243,000.00 par value certificates of indebtedness held by him to be in turn delivered to the City of Harvey upon the payment by said City of the sum of $173,000.00, which was the sum found to have been expended by said A. C. Allyn & Company in acquiring said certificates together with interest on said sum from the day and date the several certificates were acquired by said A. C. Allyn & Co.

PROCEEDINGS IN THE DISTRICT COURT.

The Master found that respondent, John G. Getz, Jr., acquired the said $243,000.00 par value certificates of indebtedness involved in this suit "from C. S. Mott by an alleged purchase, and in payment therefor delivered to said C. S. Mott a collateral note in the sum of $243,000.00"; that said certificates of indebtedness constitute the collateral to said note, and that said C. S. Mott retains actual possession of said $243,000.00 certificates. (R. 880)

The respondent, John G. Getz, Jr., testifying in his own behalf, upon cross-examination, stated that he was employed by said C. S. Mott. (R. 349)

The Master further found that said C. S. Mott acquired

said certificates of indebtedness from Stifel Nicolaus & Co., Inc., investment bankers of Chicago, Illinois, and that said Stifel Nicolaus & Co., Inc. were in joint account with A. C. Allyn & Company, investment bankers of Chicago, Illinois, in the purchase of said certificates. (R. 880)

The Master found that there was a binding refunding contract made between the City of Harvey and A. C. Allyn & Company, through its agent O'Brien, which A. C. Allyn & Company failed to perform. (R. 874)

The Master further found that, after purchasing $242,000.00 face value of said certificates for $172,450.00, through the aid and cooperation of the Commissioners of the City of Harvey, A. C. Allyn & Company abandoned the refunding contract with the City of Harvey. (R. 873)

The record in this case discloses that on January 14, 1937, A. C. Allyn & Company submitted a form of refunding ordinance to the officials of the City of Harvey, with a request that it be adopted by the City Council of said City, at the meeting to be held on January 18, 1937. (R. 755) The ordinance in the form submitted by said A. C. Allyn & Company was adopted by the City Council of the City of Harvey on January 25, 1937. (R. 702)

The record further discloses that A. C. Allyn & Company had, as a matter of fact, abandoned its refunding contract with the City of Harvey on January 15, 1937, for on that date, without notice to the City, A. C. Allyn & Company sold $220,000.00 of said certificates to one, William H. Donner of Philadelphia, Pennsylvania. (R. 725)

All relief sought by respondent was denied and a decree was entered in the District Court in accordance with the findings of the Master, as set forth in his revised and substituted report. (R. 856 to 882)

THE APPEALS TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

From that part of the decree, requiring the respondent to deliver to the Clerk of the United States District Court the said $243,000.00 par value certificates of indebtedness for delivery to the City of Harvey, upon the payment by said City of the said $173,000.00 and interest thereon, the respondent filed his appeal, and thereafter, from that part of the judgment, holding that the City of Harvey was estopped to deny the validity of said certificates, the petitioner, City of Harvey, appealed.

II.

JURISDICTIONAL STATEMENT.

The jurisdiction of this court is based upon Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925; Chapter 229, 43 Stat. 936, entitled "An Act To Amend The Judicial Code, and to further define the jurisdiction of the Circuit Court of Appeals and of the Supreme Court, and for other purposes," and reading as follows:

> "Sec. 240. (a) In any case civil or criminal in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect as if the cause had been brought there by unrestricted writ of error or appeal."

The special and important reasons advanced by the

petitioners and addressed to the Court's judicial discretion are set forth under Point IV of this petition entitled "Reasons relied on for the allowance of the writ."

The Circuit Court of Appeals for the Seventh Circuit on February 28, 1941, reversed the order and decree of the District Court of the United States for the Northern District of Illinois, Eastern Division. (R. 946)

A petition for rehearing was filed on March 14, 1941, within the time allowed by Rule 22 of the United States Circuit Court of Appeals for the Seventh Circuit. (R. 947)

The said petition for rehearing was denied and the original opinion filed by the court was modified by order of the court entered April 7, 1941. (R. 965)

The certified transcript of record, the Petition for the issuance of a Writ of Certiorari with the supporting brief annexed thereto are filed herein with the Clerk of this Court within three months after denial of the petition for rehearing by the United States Circuit Court of Appeals for the Seventh Circuit.

III.

QUESTIONS PRESENTED.

(1) Whether a purchaser of a non-negotiable instrument long after default is made in payment of interest and principal can be said to be a bona fide purchaser for value without notice.

(2) Whether a party to a contract which is performable at the time of the occurrence of a future event may put an obstacle in the way of the happening of that event, so as to be relieved of his obligation to perform.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The decision of the Circuit Court of Appeals for the Seventh Circuit in this case decided the following important questions of local law contrary to local decisions on similar questions, namely:

1. That respondent, John G. Getz, Jr., was a *bona fide* purchaser for value of the non-negotiable certificates of indebtedness sued upon, when the evidence showed such certificates were purchased by respondent, after default had been made in the payment of both principal and interest.

2. That performance of the refunding contract between the City of Harvey and A. C. Allyn & Company was excused because it was dependent on the occurrence of a future event, which remained unsatisfied, when the evidence showed that the occurrence of the future event was prevented solely by the act of A. C. Allyn & Company.

PRAYER.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court for review and determination on a day certain to be therein named, a full and complete transcript of record of all proceedings in the case, numbered and entitled on its docket, No. 7411, *John G. Getz, Jr., Plaintiff-Appellant* v *City of Harvey, a Municipal Corporation, et al., etc.;* that said judgment

of the Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises, as to this Honorable Court shall seem meet and just; and your petitioners will ever pray.

CITY OF HARVEY, a Municipal Corporation, FRANK W. BRUGGEMANN, Mayor of the City of Harvey, CHARLES H. APPLEGATE, JR., ARTHUR E. TURNGREN, NORMAN C. GALLET, GEORGE P. FISHER, Commissioners of the City of Harvey, W. L. VOSS, Treasurer of the City of Harvey, GEORGE P. FISHER, Commissioner of Public Property, and R. E. MALLSTROM, Superintendent of the Water Department,

Petitioners.

By JOHN J. DOWDLE,
Counsel for Petitioners.

ALBERT O. HOFFMAN,
WILLARD C. WALTERS,
Of Counsel.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT:

OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion and modified opinion in the Circuit Court of Appeals for the Seventh Circuit are set forth in the transcript of record filed in this cause at pages 928 and 966 thereof.

The revised and substituted report of the Master in Chancery, to whom the cause was referred by the District Court, appears in the transcript of record at pages 856 to 882 thereof.

The decree entered in the District Court, adopting, approving and confirming the revised and substituted report of the Master, appears in the transcript of record at page 900 thereof.

JURISDICTIONAL GROUNDS.

The jurisdiction of this court is invoked by virtue of the provisions of Section 240(a) of the Judicial Code, as Amended, by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, entitled, "An Act to amend the Judicial Code and to further define the jurisdiction of the Circuit Court of Appeals and the Supreme Court, and for other purposes."

The United States Circuit Court of Appeals for the

Seventh Circuit on February 28, 1941, reversed the order or decree of the District Court of the United States for the Northern District of Illinois, Eastern Division. (R. 946)

A petition for rehearing was filed on March 14, 1941, within the time allowed under the provisions of Rule 22 of the United States Circuit Court of Appeals for the Seventh Circuit. (R. 948)

On the 7th day of April, 1941, the Circuit Court of Appeals for the Seventh District entered an order denying said petition for rehearing and by said order modified the opinion theretofore filed by the court. (R. 966) The certified transcript of record, the petition for the issuance of a writ of certiorari with supporting brief annexed thereto are filed herein with the Clerk of this court within three months after denial of the said petition for rehearing in the United States Circuit Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE.

The essential facts in the case at bar are set forth in the preceding Petition for a Writ of Certiorari under Point I thereof, and in the interest of brevity are hereby readopted and made a part of this brief.

SPECIFICATION OF ASSIGNED ERRORS.

The Circuit Court of Appeals for the Seventh Circuit erred:

(1) In holding that the respondent, John G. Getz, Jr., was a bona fide purchaser for value of the certificates of indebtedness, which were acquired by him after default had been made by the City of Harvey in the payment of both principal and interest.

(2) In holding that the contract between the City of Harvey and A. C. Allyn & Company failed because one of the conditions in said contract was never fulfilled, whereas the record shows that the contract was impossible of performance by reason of the acts and conduct of A. C. Allyn & Company alone.

SUMMARY OF ARGUMENT.

1. The respondent, Getz, is not a bona fide purchaser for value of the $243,000.00 par value certificates of indebtedness of the City of Harvey, the subject matter in this suit.

2. There was a binding refunding contract between the City of Harvey and A. C. Allyn & Company.

ARGUMENT.

I.

THE RESPONDENT, JOHN G. GETZ, JR., IS NOT A BONA FIDE PURCHASER FOR VALUE OF THE $243,000.00 PAR VALUE CERTIFICATES OF INDEBTEDNESS OF THE CITY OF HARVEY, THE SUBJECT MATTER IN THIS SUIT.

In answer to interrogatories, respondent, John G. Getz, Jr., stated that he acquired $243,000.00 per value certificates of indebtedness of the City of Harvey from C. S. Mott on November 20, 1937, and that he paid the sum of $243,000.00 for said certificates. (R. 40 and 44)

In answer to other interrogatories, he stated he had knowledge that said certificates had been in default since August 1, 1933. These answers were sworn to before a notary public on the 7th day of June, 1939. (R. 40 and 44)

On the 3rd day of August, 1939, John G. Getz, Jr., in answer to questions asked upon cross-examination, testified that he acquired the $243,000.00 certificates of indebtedness of the City of Harvey during March, 1939; that he acquired them from C. S. Mott for whom he worked; that he did not pay cash for them, but that he gave his note in the amount of $243,000.00 in payment of said certificates; that his note in that amount was not a good note; that his earnings did not warrant "his issuing a note of that magnitude"; that he made no investigation of the ordinances of the City of Harvey because the bonds bear an opinion; that he did not see the opinion until the bonds

were delivered; that he did not recall whose opinion accompanied the bonds; that the $243,000.00 certificates of indebtedness of the City of Harvey are held by C. S. Mott as collateral to his note. (R. 349 and 354)

The Circuit Court of Appeals for the Seventh Circuit in overruling the findings of the Master in respect of the status of the respondent Getz and in reversing the judgment in the District Court, says in its opinion:

> "The title of plaintiff as a bona fide purchaser for value of non-negotiable certificates without notice of defense, like that of an assignee of a chose in action, is in no wise affected by any latent equity arising, not out of the consideration upon which the certificate was issued but out of unknown dealings between the issuer and an intermediate holder in plaintiff's chain of title." (R. 933)

The court decided that the certificates are non-negotiable instruments, but urges that they are subject only to the defenses which might have been made against the payee to whom they were originally issued. This is not the law in our opinion.

We believe the law of Illinois is definite on this point. It is:

> "The holder of non-negotiable instruments holds it subject not only to all defenses originally existing against the payee, but as to all defenses arising before notice of transfer."
>
> 17 Amer. & Eng. Ency. of Law, 232.
>
> *Bank* v. *Hines*, 177 Ill. 417.
>
> *Barker* v. *Barth*, 192 *id.* 460.

The court in its opinion further says (R. 932):

> "We are first confronted with the question of whether plaintiff, in the situation he finds himself, is bound by any alleged latent equity in the favor of the city as against O'Brien and Allyn & Company.

> The master found, and the court agreed, that plaintiff stood in the shoes of Allyn & Co. But the evidence discloses that plaintiff is a purchaser for value and had no knowledge of any dealings between the City and O'Brien or Allyn & Company."

The evidence shows that the respondent, Getz, at the time he acquired said certificates, knew that they had been in default for almost five years. (R. 44)

In view of the evidence, the court's conclusion should have been that respondent had the duty to inquire of the maker the reason for the default. Respondent would then have been informed of petitioner's claims against A. C. Allyn & Company, for petitioner, City of Harvey, was the maker. Respondent's failure to make such inquiry does not excuse him and he is charged with knowledge of the City's defenses. The cases cited by the court (R. 933) in its opinion are not in conflict with this proposition, but on the contrary sustain it. The court quotes with approval the following language from the case of *Silverman* v. *Bullock, et al.*, 98 Ill. 11:

> "Persons dealing in such securities can, *without difficulty, inquire of the makers if any defenses exist against them,* but more than that it is not practicable to do. Of Course, it would not be possible to discover, even by the utmost diligence, all persons that might have equitable rights in the subject matter of the assignment, and the adoption of a rule that would let in latent equities to prevail against the assignee would be to ensnare dealers in such securities." (Italics added.)

A familiar definition of bona fide purchaser, as given in Ballentine's Law Dictionary, 1930 Edition, is "One who buys for a valuable consideration with an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law."

23 R. C. L. 241.

Mr. Getz fails to qualify under this definition for Mr. Getz filed his complaint in this case June 9, 1938, within three months of the time he says he acquired said certificates, and in this suit seeks to recover not only the principal amount of said certificates, but in addition thereto, more than $220,000.00 in past due interest coupons (R. 623), where the evidence shows that the respondent purchased said certificates with a note which he admits was not good. (R. 218)

II.

THERE WAS A BINDING REFUNDING CONTRACT BETWEEN THE CITY OF HARVEY AND A. C. ALLYN & COMPANY.

The Circuit Court of Appeals for the Seventh Circuit in its opinion (R. 934) says:

> "The first proposal, that of April 20, 1936, was not one which bound O'Brien to do anything other than 'to lend his best efforts toward refinancing the obligations outstanding.' The second (Sept. 8th, 1936) was expressly subject to and 'dependent' upon his ability to purchase and deliver the outstanding securities in exchange for the refunding certificates. The evidence is undisputed that he was never able to comply; that he found it impossible to procure all of the outstanding certificates and so notified the city. Neither proposal required him to deliver to the city anything less than the entire outstanding lot of certificates, and he was bound to do that only if he were able to procure all of them. When this condition, upon which existence of a binding contract depended, remained unsatisfied, all obligations of the city to him and of him to the city were at an end."

The court overlooks the evidence in the record, which shows that the O'Brien contract was dependent upon his ability to acquire sufficient certificates "to declare his

plan workable," and was not dependent upon his ability to acquire all of the outstanding certificates. (Defendant's Exhibit 6, Rec. 716.)

The court misapprehends the evidence and fails to note that the contract of September 8, 1936, between the City of Harvey and Roy D. O'Brien provided that the time limit of ninety days might be extended with the consent of the Mayor and Chairman of Finance Committee of the City of Harvey. (Rec. 715, 716)

The court overlooks the records which shows that the parties by their conduct extended the time for performance, in this, that A. C. Allyn & Company on January 28, 1937 (Def. Ex. 41, Rec. 756), addressed a direction to the City of Harvey to publish the refunding ordinance previously adopted by the City of Harvey on January 25, 1937 (Rec. 712), at the request of O'Brien. (Rec. 755, 756) All of these proceedings were had after the expiration of the ninety-day term specified in the contract of September 8th.

The court overlooks the evidence in the record (Rec. 725) that thirteen days earlier on January 15, 1937, A. C. Allyn & Company had put it beyond its power to comply with the refunding contract, by having sold $220,000.00 par value of securities held by it to William H. Donner of Philadelphia without previous notice to the City.

The court overlooks the evidence that there had been full compliance with the conditions of the contract of September 8, 1936, on the part of the City of Harvey. See testimony of Frank W. Bruggemann, Mayor of Harvey. (Rec. 438)

The court overlooks the evidence in the record that $429,000.00 or $430,000.00 par value outstanding certificates of indebtedness were in the possession or under the control of A. C. Allyn & Company (Rec. 444) and that, under the provisions of the contract of September 8, 1936,

it was proposed to refund but $452,000.00 certificates of indebtedness. (Rec. 715)

The court overlooks the evidence which shows that on January 28, 1937, when A. C. Allyn & Company directed the City of Harvey to publish the refunding ordinance, which had been adopted on January 25, 1937, it had sold and disposed of all of the certificates which it had acquired in pursuance of the refunding contract with the City of Harvey and had placed an obstacle in the way of the happening of the event upon which the contract of September 8, 1936, was based.

The court misapprehends the law with respect to the facts above set forth. The applicable principle of local law is set forth at page 225 in the case of *Jordan* v. *Busch*, 285 Ill. App. There the court says:

> "It seems clear that where a contract is made which is performable at the time of the occurrence of a future event, the law imputes to the promisor an agreement that he will put no obstacle in the way of the happening of that event and that he will hold himself in readiness to co-operate where his co-operation is a necessary element. If, in violation of this implied covenant on his part, he does something which prevents the happening of the event, the contract becomes absolute and must be performed as though the event had occurred. *Marvin* v. *Rogers*, 53 Tex. Civ. App. 423, 115 S. W. 863."

The petitioners respectfully submit that a Writ of Certiorari should be granted in order that this court may review the judgment of the Circuit Court of Appeals in the exercise of its supervisory powers.

Respectfully submitted,

JOHN J. DOWDLE,
Counsel for Petitioners.

ALBERT O. HOFFMAN,
WILLARD C. WALTERS,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. [redacted] 79

JOHN G. GEITZ, JR.,

Respondent,

7411

vs.

CITY OF HARVEY,
a municipal corporation,

Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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HARVARD & MILLER, 33 N. Market St., Chicago. Tel. [redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 1038

JOHN G. GETZ, JR.,

Respondent,

7411 *vs.*

CITY OF HARVEY,
a municipal corporation,

Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

FOREWORD.

MAY IT PLEASE THE COURT:

The petition for writ of certiorari filed by the City of Harvey, a municipal corporation in the County of Cook and State of Illinois, and its officials, relates to the appeal

of *John G. Getz* v. *City of Harvey, et al.,* No. 7411, in the Circuit Court of Appeals for the Seventh Circuit.

Petitioners have limited their appeal to two questions: (1) Whether John G. Getz, Jr., respondent, had notice of the alleged agreement entered into between the City of Harvey and Roy D. O'Brien; and (2) Whether or not John G. Getz, Jr. was bound by latent equities, if any, in favor of the city as against Roy D. O'Brien.

Jurisdiction in this court is claimed on the ground that the decision of the Circuit Court of Appeals for the Seventh Circuit is contrary to local decisions in similar questions. We submit that the cases of the Illinois Supreme Court and the Illinois Appellate Court which the Circuit Court of Appeals cited relating to the two questions now raised by petitioners are specifically applicable to the facts in the instant matter and are the established law of the State of Illinois.

Counsel for petitioners has not set forth any evidence to contradict the facts as set forth in the opinion of the Circuit Court of Appeals. The statement of the facts and the law as set forth in the opinion appear in the transcript of the record at pages 932 to 934, inclusive.

In view of the fact that the issues decided by the Circuit Court of Appeals are in strict conformity with the decisions of the Illinois Supreme and Appellate Courts, petitioners seek by certiorari to review and discuss only specific facts to the exclusion of all the facts as established by the evidence. Under such circumstances, this court has held:

> "We do not grant a certiorari to review evidence and discuss specific facts."
>
> *U. S.* v. *Johnston,* 45 S. Ct. Rep. 496, 497; 268 U. S. 220.

"The writ of certiorari was not granted to review the particular facts, but to pass upon the question of principle."

Crowell v. *Benson,* 52 S. Ct. Rep. 285, 298; 285 U. S. 22, 65.

"The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80 per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Magnum Import Co. v. *Coty,* 43 S. Ct. Rep. 531, 532; 262 U. S. 159, 163.

SUMMARY OF ARGUMENT.

I.

Respondent's reply to petitioners' proposition:

"Respondent, John G. Getz, Jr., is not a bona fide purchaser for value of the $243,000 par value certificates of indebtedness of the City of Harvey, the subject matter in this suit."

1. Petitioners' own evidence established that C. S. Mott purchased the 243,000 water fund certificates of indebtedness by paying $243,000 in cash.
   (a) Mr. Getz purchased the certificates from Mr. Mott and gave his note for the full amount and deposited the certificates as collateral security for its payment.
   (b) The statement made by counsel for petitioners that Mr. Getz testified that his note was not a good note failed to state all that Mr. Getz said. Mr. Getz stated that he could not issue a note of that magnitude unless it was secured by good collateral and in his opinion the water fund certificates which were pledged as collateral were good.
   (c) C. S. Mott having paid full value for said water fund certificates it is immaterial to the petitioners what the transaction was between Mr. Mott and Mr. Getz.
2. Petitioners contend that the water fund certificates, being non-negotiable instruments, respondent was under duty to inquire of the maker the reason for the default.

(a) The record in this case establishes that the default in the payment of principal and interest on the water fund certificates was due to the diversion of those funds by the City officials for other purposes.

(b) The accounting in this suit first established those facts.

3. Respondent did not have any notice or knowledge of the alleged agreement between O'Brien and the City of Harvey.

(a) Under Section 22 of the Commission Form of Government Act it is mandatory that every motion, resolution and ordinance shall be reduced to writing and read before vote is taken, and upon every vote the "yeas" and "nays" shall be called and recorded.

(b) Under Section 33 of the Commission Form of Government Act the making or authorizing of any contract must be in writing, must remain on file with the city or village clerk for public inspection complete in form in which it is finally passed, at least one week before the final passage or adoption thereof.

(c) The Supreme Court of the State of Illinois has construed the foregoing sections to be mandatory and unless complied with the agreement is invalid.

4. Neither the alleged agreement dated April 20, 1936, nor the alleged agreement dated September 8, 1936, were acted upon by the city council as required by Sections 22 and 33 of the Commission Form of Government Act.

(a) A secret meeting was held on April 21, 1936, in a small room off the city clerk's office.

(b) The city clerk testified that he had always kept minutes of the proceedings of the city council except the alleged meeting of April 21, 1936. No meeting was called to consider the proposal of September 8, 1936.

(c) Upon being questioned by the master why no record was made of the meeting of April 21, 1936, the city clerk testified that he was instructed by the mayor not to keep the minutes because the refinancing was something they wanted to keep as quiet as possible and not give too much publicity because "we were trying to get the certificates in at as low a figure as possible."

(d) In view of the fact that no records were kept of the O'Brien transactions obviously Mr. Getz could not have obtained knowledge or notice from the records either by inspection or by constructive notice.

5. The City of Harvey has no power or right to purchase outstanding water fund certificates. This has been clearly established by the Illinois Supreme Court decisions.

6. The Circuit Court of Appeals found that Mr. Getz had no knowledge of any dealings between the City of Harvey or O'Brien and Allyn & Company; that if the City of Harvey could claim any equity as a defense, it would come within the well-established rule as laid down by the Illinois Supreme and Appellate Courts to the effect that latent equities between intermediate parties cannot be set up as against a purchaser for value after maturity.

II.

Respondent's reply to petitioners' proposition:

"There was a binding refunding contract between the City of Harvey and A. C. Allyn & Company."

1. Counsel for petitioners' contention that the O'Brien contract was dependent upon O'Brien's ability to acquire sufficient certificates to "declare his plan workable" and was not dependent upon his ability to acquire all of the outstanding certificates is fallacious in that unless Mr. O'Brien was able to acquire all of the outstanding certificates it would have been impossible for him to declare the plan workable.

   (a) The petitioners' own evidence conclusively proved from the records of A. C. Allyn & Company and Stifel, Nicolaus & Company that $222,000 par value of water fund certificates was the total number that A. C. Allyn & Company had ever been able to acquire. The total number of certificates to be refunded was $452,000.

   (b) Mr. O'Brien testified that it was impossible to acquire the balance needed to refund the two issues.

2. The Circuit Court of Appeals' decision fully conforms with the Illinois law.

ARGUMENT.

I.

Respondent's reply to petitioners' proposition:

"Respondent, John G. Getz, Jr., is not a bona fide purchaser for value of the $243,000 par value certificates of indebtedness of the City of Harvey, the subject matter in this suit."

The petitioners' own evidence established that C. S. Mott purchased the $243,000 water fund certificates of indebtedness by paying $243,000 in cash. The Circuit Court, in its opinion, referred to the various trades in these securities among A. C. Allyn & Company, Stifel, Nicolaus & Company, and others between October 15, 1936, and November 15, 1937, at prices ranging from 70c to par. "Eventually on August 18, 1937, Stifel, Nicolaus & Company sold to one Mott in Detroit, Michigan, $220,000 and on November 17, 1937, $21,000 in certificates, all at par. Mott paid cash and entered into no arrangement for repurchase by the seller. The securities were sold to him without recourse and for cash. Thereafter Mott sold them to plaintiff at par. Plaintiff executed his note for the full amount and deposited the certificates as collateral security for its payment." (Tr. 932)

The statement made by counsel that Mr. Getz testified that his note in that amount was not a good note failed to state all that Mr. Getz said. What Mr. Getz stated in response to a question by Mr. Dowdle is as follows:

> "I would say freely to you that my note in that amount is not a good note except as the value of the things I purchased with that are good, which in my

opinion they are. * * * But, if what you are getting at is that the amount of money that I may have earned doesn't warrant my issuing a note of this magnitude, I say that's perfectly true and admitted, except in so far as what I purchased with the note is the value." (Tr. 218)

In so far as petitioners are concerned, whether the note which Mr. Getz gave to C. S. Mott is good or not is immaterial. The fact still remains that Mr. Mott paid $243,000 in cash for the water fund certificates and in turn sold them to Mr. Getz.

"* * * if any intermediate holder between the defendant and the plaintiff gave value for the bill, that intervening consideration will sustain the plaintiff's title."

Inhabitants of Montclair v. *Ramsdell,* 2 S. Ct. Rep. 391, 401; 107 U. S. 147, 156.

The second point argued by petitioners is to the effect that the water fund certificates being non-negotiable instruments, respondent is under duty to inquire of the maker the reason for the default. Obviously, from the record in this case, the reason for the default in payment of principal and interest of the water fund certificates was because the officials of the City of Harvey diverted the funds for other purposes. Counsel, however, states that if respondent had inquired into the reason for the default he would have been informed of petitioners' claims against A. C. Allyn & Company.

In answer to this contention it is necessary to point out to this court, as was pointed out in our briefs to the Circuit Court of Appeals, that the City of Harvey is organized under what is known as the Commission Form of Government Act of the State of Illinois. Section 22 of this Act is as follows:

"Every such city or village shall be governed by a council, consisting of the mayor and four commis-

sioners, as provided in this Act, each of whom shall have the right to vote on all questions coming before the council. Three members of the council shall constitute a quorum, and the affirmative vote of three members shall be necessary to adopt any motion, resolution or ordinance, or pass any measure, unless a greater number is provided for by this Act.

"Upon every vote the 'yeas' and 'nays' shall be called *and recorded,* and every motion, resolution or ordinance *shall be reduced to writing* and read before a vote is taken thereon, and all the commissioners, including the mayor, present at any meeting shall vote thereon." (Italics ours.)

Chap. 24, Par. 286, p. 397, Ill. Rev. Stats. 1937.

Section 33 of the Commission Form of Government Act specifically prescribes the following:

"* * * Every ordinance or resolution appropriating any money, * * * *or making or authorizing the making of any contract* * * * *shall remain on file with the city or village clerk for public inspection, complete in form in which it is finally passed, at least one week before the final passage or adoption thereof.*" (Italics ours.)

Chap. 24, Par. 298, p. 399, Ill. Rev. Stats. 1937.

The foregoing sections have been construed by the Illinois Supreme Court to be mandatory and that if any action is taken or any contract is entered into which does not strictly comply with these provisions the same is null and void.

"Appellant objected to the confirmation of the assessment on the ground that the ordinance is void for the reason that it was not on file with the city clerk for public inspection for one week before its passage. * * * One of the necessary steps prescribed by the Act regulating the passage of ordinances in the city of Ottawa was omitted, and therefore the ordinance was not legally passed. * * * The objection challenging the validity of the ordinance should have been sustained."

City of Ottawa v. *Hulse,* 317 Ill. 276, 277.

In the case of *City of Zion* v. *Christian Catholic Church,* 286 Ill. App. 449, the court held a lease invalid because the city council had not let it lie over a week as required by Section 33.

> "* * * It therefore appears from this record that at the final meeting of the city council prior to the new council assuming office, the proposed form of lease agreement was presented by appellants and acted upon by the council contrary to sec. 33 of the act. This section was before the Supreme Court in the case of *City of Ottawa* v. *Hulse,* 317 Ill. 276. It was there held that the provision of said section requiring any such contract, etc., to remain on file with the city or village clerk for public inspection, at least one week before the final passage or adoption, *was mandatory and that a compliance with such provision was necessary to the validity of any ordinance or official act of the council coming within its terms.* We are of the opinion that what was said in that case is controlling in this case." (Italics ours.)
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> *City of Zion* v. *Christian Catholic Church,* 286 Ill. App. 449, 451, 452.

We have set forth the foregoing sections of the Commission Form of Government Act for the reason that the alleged agreement between the City of Harvey and Roy D. O'Brien was never acted upon by the city council as required by those particular sections. The evidence established that there was an alleged meeting held on the 21st day of April, 1936, called for the purpose of considering the O'Brien proposal dated April 20, 1936. This was a special meeting held in a small room off the city clerk's office. No notice with reference to this special meeting had been sent out in writing; the officers were called by telephone on the same day as the meeting was held. (Tr. 435) In answer to the following questions Mr. Norton, the City Clerk of the City of Harvey, testified as follows:

"Q. Now, as city clerk, you always keep minutes

of the proceedings, do you not? A. Not always. I did not in this case.

Q. How many other cases besides this? A. None to my knowledge. This is unusual.

Q. This is unusual? A. Unusual case. (Tr. 435)

* * * *

Q. And after this meeting here, you made no memorandum, did you, regarding what was done there, in writing? A.. No, sir." (Tr. 437)

In replies to questions put by the Master, Mr. Norton stated the following:

"Q. Can you explain why it was that no record was made at that time of that proceeding? A. Yes, sir.

Q. I would like to have you do so. A. I was instructed by Mr. Bruggeman [the mayor] not to keep the minutes, because this refinancing was something that they wanted to keep as quiet as possible, and not give too much publicity because we were trying to get the certificates in at as low a figure as possible." (Tr. 437)

The foregoing testimony, which was corroborated by the mayor and the commissioners, proved that no records of the alleged transactions between Roy D. O'Brien and the City of Harvey were ever made. Consequently, the alleged agreement with Roy D. O'Brien dated April 20, 1936, was never made part of the records of the City of Harvey as required by Sections 22 and 33 of the Commission Form of Government Act, and therefore was not only a matter *not* of record but also was not a legal contract.

It has long been the rule in Illinois that a city or village must keep a record of its proceedings; that such a record, which is the only source of evidence by which official action can be shown, which does not show any action shows that none was taken. (*Village of Bellwood* v. *Galt,* 321 Ill. 504, 508, 509; *Roemheld* v. *Chicago,* 231 Ill. 467, 470; *Arnold* v. *Village of Ina,* 244 Ill. App. 239, 240.)

It is apparent that if Mr. Getz had sought to inquire into the alleged transactions between Roy D. O'Brien and the officials of the City of Harvey the records, which would have been the only available source by which such transactions could be established, would have shown nothing regarding this matter. The entire transaction, as testified to by the city clerk, was to have been kept secret. Furthermore, the city clerk testified that "We were trying to get the certificates in at as low a figure as possible." This indicates the motive that actuated the secrecy of this transaction. The object, as disclosed by petitioners' theory, was to purchase the water fund certificates at a low figure. That the City of Harvey had no such power or right is equally well established under the decisions of the Illinois Supreme Court. (*Chicago* v. *Brede,* 218 Ill. 528, 536; *Berman* v. *Board of Education,* 360 Ill. 535, 541.)

The alleged agreement with O'Brien dated September 8, 1936, was never acted upon by the city council as required by Sections 22 and 33 of the Commission Form of Government Act or in any manner whatsoever. By its terms it expired in 90 days from September 8, 1936. As far as the evidence disclosed the agreement expired under its own terms.

The Circuit Court of Appeals, in considering these two agreements, found that Mr. Getz had no knowledge of any dealings between the City of Harvey and O'Brien or Allyn & Company. (Tr. 932) Notwithstanding this, the court pointed out that even were Mr. Getz bound by the so-called proposal and negotiations between O'Brien and Allyn & Company on the one hand, and the city on the other, upon analysis of those transactions it was apparent that no equity arose in favor of the city. However, even if the City of Harvey were to claim any equity as a de-

fense, it would come within the rule cited by the Circuit Court of Appeals to the effect that it was a latent equity and one that would not be available as a defense against the respondent herein. The case of *Freiner* v. *Lane,* 302 Ill. App. 248, is clearly in point. The facts in that case bear a close analogy to the facts in the case at bar. In that case the court applied the rule laid down in the case of *Silverman* v. *Bullock,* 98 Ill. 11. On page 256 the court said:

> "It is well settled that latent equities between intermediate parties cannot be set up as against a purchaser after maturity. *Wolford* v. *Rusk,* 145 Ill. App. 405, *Silverman* v. *Bullock,* 98 Ill. 11."
>
> *Freiner* v. *Lane,* 302 Ill. App. 248, 256.

Petition for leave to appeal to the Supreme Court was denied in the *Freiner case* so that the same can be treated as final (302 Ill. App. xv). The Circuit Court of Appeals correctly followed the Illinois law.

II.

Respondent's reply to petitioners' proposition:

"There was a binding refunding contract between the City of Harvey and A. C. Allyn & Company."

Counsel for petitioners under this point states that the court overlooked the evidence in the record that shows that the O'Brien contract was dependent upon his ability to acquire sufficient certificates to " 'declare his plan workable' and was not dependent upon his ability to acquire all of the outstanding certificates." The fallacy of this argument is that unless Mr. O'Brien was able to acquire all of the outstanding certificates it would be impossible for him to declare the plan workable. Counsel also states that the court misapprehended the evidence

and fails to note that in the contract of September 8, 1936, between the City of Harvey and Roy D. O'Brien it is provided that the time limit of 90 days might be extended, with the consent of the mayor and chairman of Finance Committee of the City of Harvey. As we have heretofore pointed out, this contract was never legally authorized and there was no evidence that the contract was extended. Mr. O'Brien testified that it was never formally extended. (Tr. 362)

Counsel also complains about other acts which took place after September 8, 1936. None of these acts disprove the fact that the total number of water fund certificates that Mr. O'Brien was able to procure control over were $243,000. (Tr. 362) The total certificates to be refunded were $452,000. The balance of these bonds, Mr. O'Brien testified, were impossible to obtain. (Tr. 363) Notwithstanding counsel's statement to the effect that the court overlooks the evidence of the record that $429,000 or $430,000 par value outstanding certificates of indebtedness were in the possession or under the control of A. C. Allyn & Company (Tr. 444), the fact is that the evidence conclusively shows the total number of certificates in the possession and control of A. C. Allyn & Company was, as proved by the City of Harvey, and as pointed out by the court in its decision (Tr. 932), to have been only $222,000. The fact that the Public Service Company had $129,000 in water fund certificates, the Reconstruction Finance Corporation others, and that some were in Joliet is not proof they were in the possession and control of A. C. Allyn & Company. Counsel for the City of Harvey introduced in evidence the books and records of A. C. Allyn & Company and Stifel, Nicolaus & Company. Those records conclusively prove that $222,000 par value water fund certificates were the total number that A. C. Allyn & Company had ever been able to acquire.

CONCLUSION.

Respondent respectfully submits that the petition for certiorari in this matter seeks only a rehearing of certain specific facts relating to the Roy D. O'Brien transaction. The facts involved in this matter have been carefully considered by the Circuit Court of Appeals, and the court has properly applied the law of the State of Illinois to those facts.

Wherefore, respondent respectfully prays that the application for the writ of certiorari be denied.

Respectfully submitted,

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